

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

March 21, 2006

Jerome B. Reed

Delaware Correctional Center
P.O. Box 500
Smyrna, DE 19977

Thomas D. H. Barnett, Esquire
512 East Market Street
Georgetown, DE 19947

James W. Adkins, Esquire
Department of Justice
114 East Market Street
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RE: State of Delaware v. Jerome B. Reed
Def. ID# 0101023931

Memorandum Opinion - Motion for Postconviction Relief

Date Submitted: February 10, 2006

Dear Mr. Reed and Counsel:

This is my decision on defendant Jerome B. Reed's ("Reed") second motion for postconviction relief. Reed was convicted of Robbery in the First Degree, Possession of a Firearm During the Commission of a Felony, Kidnaping in the Second Degree, two counts of Burglary in the Second Degree, Unlawful Imprisonment in the Second Degree, two counts of Theft, and Criminal Mischief. The charges arose out of Reed's robbery of Cecil Bounds at his home on January 25 and 29, 2001.

I sentenced Reed on November 30, 2001. The Supreme Court affirmed Reed's convictions on June 21, 2002. Reed filed his first motion for postconviction relief on March 5, 2003. Reed set forth a number of grounds for relief in his first motion for postconviction relief, all of which alleged

ineffective assistance of counsel. Reed was represented at trial by Thomas D. H. Barnett, Esquire (“Barnett”). I denied Reed’s first motion for postconviction relief on August 6, 2003.¹ The Supreme Court affirmed my denial on March 22, 2004.²

Reed filed his second motion for postconviction relief on September 19, 2005. Reed’s grounds for relief are, except for one, based upon alleged ineffective assistance of counsel. Several of the allegations are identical to the ones Reed raised in his first postconviction relief motion. Reed filed an amendment to his second motion for postconviction relief adding three more allegations of ineffective assistance of counsel on November 28, 2005. Barnett filed an affidavit responding to Reed’s allegations on January 9, 2006. I have concluded that, given the non-factual nature of Reed’s allegations, there is no need to hold an evidentiary hearing.

This is Reed’s second motion for postconviction relief. It is untimely³, repetitive, and the arguments have been previously adjudicated. Therefore, it is barred by Superior Court Criminal Rule 61, subsections (i)(1), (i)(2), and (i)(4). Moreover, there are no “colorable claims that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.”⁴ Although all of Reed’s arguments are without merit, repetitive and untimely, I will briefly address them.

¹ *State v. Reed*, 2003 WL 22853417 (Del. Super.).

² *Reed v. State*, 843 A.2d 696 (Del. 2004).

³ The Supreme Court’s decision became final on July 11, 2002. Even overlooking the fact that Reed previously filed a motion for postconviction relief, the opportunity to file a motion for postconviction relief became time-barred three years after the judgment of the conviction became final, which was on July 11, 2005. Reed did not file the second motion for postconviction relief until September 19, 2005, which was beyond the time period.

⁴ *Outten v. State*, 720 A.2d 547, 556 (Del. 1998), *citing* Super. Ct. Crim. R. 61(i)(5).

A. Ineffective Assistance of Counsel

Reed alleges that he received ineffective assistance of counsel during his trial and direct appeal. The United States Supreme Court has established the proper inquiry to be made by courts when deciding a motion for postconviction relief.⁵ In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must engage in a two-part analysis.⁶ First, the defendant must show that counsel's performance was deficient and fell below an objective standard of reasonableness.⁷ Second, the defendant must show that the deficient performance prejudiced the defense.⁸ Further, a defendant "must make and substantiate concrete allegations of actual prejudice or risk summary dismissal."⁹ It is also necessary that the defendant "rebut a 'strong presumption' that trial counsel's representation fell within the 'wide range of reasonable professional assistance,' and this Court must eliminate from its consideration the 'distorting effects of hindsight when viewing that representation.'"¹⁰

i. In-court identification

Reed alleges that Barnett was ineffective for failing to suppress an in-court identification of him by Bounds. Reed made the same allegation in his first motion for postconviction relief. I ruled then that Reed had presented no legal or factual basis to support his claim. Reed has not offered

⁵ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁶ *Strickland*, 466 U.S. at 687.

⁷ *Id.* at 687.

⁸ *Id.* at 687.

⁹ *State v. Coleman*, 2003 WL 22092724 (Del. Super. Ct.).

¹⁰ *Coleman*, 2003 WL at *2, quoting *Strickland*, 466 U.S. at 689.

anything new that supports this allegation. Thus, this allegation is repetitive and without merit. I would note, as I did the first time that I addressed this allegation, that Bounds did not identify Reed at trial as the person who robbed him. The State proved that Reed was the perpetrator through other evidence.

ii. Barnett did not represent Reed to the fullest

Reed alleges that Barnett was unable to properly represent him because he took over the case only 39 days before the start of the trial. Reed made substantially the same argument in his first motion for postconviction relief. I ruled then that Reed had presented no factual or legal basis to support his claim. Reed has not offered anything new that would cause me to doubt Barnett's effort. Thus, this allegation is repetitive and without merit.

iii. Barnett did not inform Reed about the status and content of the direct appeal

Reed alleges that Barnett was ineffective because he did not confer with him or keep him abreast of the issues concerning his direct appeal. Reed did not raise this issue in his first motion for postconviction relief, but he certainly could have done so. Reed alleges that Barnett's failure in this regard prevented him from appealing the proper issues. Barnett acknowledged that he has no recollection of whether he discussed the appeal with Reed, but he does believe that he did appeal the only appealable issue in Reed's case. While Barnett certainly should have conferred with Reed about the appeal, I have no reason to believe that Barnett's failure to do so made any difference. Reed has simply not presented me with any information concerning the issues that arguably should have been appealed. Thus, without more, there is no merit to this allegation.

iv. Unanswered letters

Reed alleges that Barnett was ineffective because he did not respond to his letters. Reed

raised this argument in his first motion for postconviction relief. I ruled then that this allegation was without merit. Reed has not offered anything new that would support this allegation. Thus, this allegation is repetitive and is without merit.

v. Habitual offender ruling

Reed alleges that Barnett was ineffective because he failed to appeal his sentencing as an habitual offender. The State filed a motion prior to sentencing to declare Reed a habitual offender pursuant to 11 Del.C. § 4214. The motion lists numerous felony convictions. However, Reed has not identified those convictions which do not qualify as predicate offenses for the habitual offender statute. Thus, without more, there is no merit to this allegation.

vi. Failing to move for a mistrial

Reed alleges that Barnett should have either attempted to suppress or moved for a mistrial when incriminating evidence was revealed to the jury during the trial. Reed's argument is based on statements he made to the police during a recorded interrogation that was played for the jury. Reed believes that the statements were prejudicial and affected the outcome of the case. In Reed's first motion for postconviction relief he argued that Barnett should have filed a motion to suppress statements made by him to the police after his arrest. I assume that these are the same statements that Reed now continues to object to. I note that Reed did not in his first motion for postconviction relief identify any of the statements or how they influenced the result of the trial. Similarly, Reed has not identified any of the statements in his second motion for postconviction relief or stated how they influenced the trial. Barnett believes that Reed takes issue with the fact that Reed asked for an attorney on the tape. At trial, Reed was concerned that asking for an attorney might create the appearance of guilt. To correct any misconception, I gave the jury the following curative instruction:

Ladies and gentlemen, there are a couple of things on that tape that require me to comment for you. There was a mention on that tape that the defendant had asked for a lawyer. The defendant has a constitutional right to ask for a lawyer, as we all do under those circumstances. The fact that he did ask for a lawyer or did mention a lawyer, is in no way any sort of admission of guilt and you should not consider it for that purpose at all.

I was satisfied at the time of trial that this was adequate and I remain satisfied.

B. Robbery in the First Degree

Reed alleges that the State did not prove all of the elements of Robbery in the First Degree beyond a reasonable doubt. Reed's argument is based on decisions issued by the Delaware Supreme Court shortly after his direct appeal. Reed argues that *Word v. State*,¹¹ *McKamey v. State*,¹² and *Walton v. State*¹³ prohibit a conviction of Robbery in the First Degree based upon the facts of his case. In those cases, the Supreme Court elaborated on what it means to "display" a weapon. The Court in *Muhammad*, quoting *Walton*, stated that "there must be conduct, in addition to the verbal threat, that could be viewed objectively as 'display[ing] what appears to be a deadly weapon.'"¹⁴ Reed's argument is based upon his belief that the State did not prove that he possessed a weapon during the robbery. Reed's argument is misplaced. Robbery in the First Degree is defined as:

"(a) A person is guilty of robbery in the first degree when the person commits the crime of robbery in the second degree and when, in the course of the commission of the crime or of immediate flight therefrom, the person or another participant in the crime:

¹¹ 801 A.2d 927 (Del. 2002).

¹² 2003 WL 22852614 (Del. Supr.).

¹³ 821 A.2d 871 (Del. 2003).

¹⁴ *Muhammad v. State*, 829 A.2d 137, 139 (Del. 2003) citing *Walton*, 821 A.2d at 876.

(2) Displays what appears to be a deadly weapon or represents by word or conduct that the person is in possession or control of a deadly weapon; or

(4) Commits said crime against a person who is 62¹⁵ years of age or older.”¹⁶

In order for Reed to be convicted of Robbery in the First Degree only one of the additional elements has to be proven. Reed was charged with violating 11 Del.C. § 832(a)(4). Reed’s victim, Mr. Bounds, testified at the trial that he was eighty-six years old.¹⁷ The fact that Mr. Bounds was over the age of sixty-five¹⁸ satisfies subsection (a)(4). Reed’s argument that the State did not demonstrate he possessed a weapon as part of the robbery charge is without merit since it was not an element of the offense that he was actually charged with committing. Thus, there is no merit to this argument.

CONCLUSION

Reed’s motion for postconviction relief is DENIED.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

¹⁵ At the time of the indictment, 11 Del. C. § 832(a)(4) required the victim to be 65 years of age or older. 73 Del. Laws, c. 126, which lowered the age to 62 became effective July 9, 2001.

¹⁶ 11 Del. C. §§ 832 (a)(2) and (4).

¹⁷ Transcript A-84.

¹⁸ See footnote 10.